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No. 83-86

In the Supreme Court of the United States

OCTOBER TERM, 1983

S.E. NICHOLS OF OHIO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner constructively discharged employee Lena Barnhart because of her protected activities.

2. Whether substantial evidence supports the Board's finding that employee Barnhart made reasonable efforts to obtain alternative employment.

3. Whether petitioner was denied due process by exclusion of certain evidence from the unfair labor practice hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 704 F.2d 921. The Decision and Order of the National Labor Relations Board (Pet. App. 8a-70a) is reported at 258 N.L.R.B. 1.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1983. The petition for a writ of certiorari was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et. seq.*, are set forth at Pet. 2-3.

STATEMENT

1. The pertinent facts, as summarized in the administrative law judge's (ALJ's) opinion, are as follows. Petitioner operates a discount department store in New Philadelphia, Ohio. In 1970, petitioner employed Lena Barnhart as a clerk in its men's wear department.[1] Barnhart led a Union organizing campaign in 1971, and on April 1, 1971, petitioner dismissed her. On March 17, 1972, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging Barnhart because of union activities, and ordered petitioner to reinstate her to her former job and provide backpay.[2] The court of appeals enforced the Board's order in full on December 27, 1972.[3] In July 1973 and again in March 1975, petitioner offered to reinstate Barnhart, but both times assigned her exclusively to scrubbing and cleaning duties instead of the clerk's position she had held during her original tenure. Rather than accept demotion by continuing to work at these menial tasks, Barnhart on both occasions left petitioner's employment after a brief period. In 1978, the Board instituted contempt proceedings against petitioner for its failure to comply with the court's 1972 order. On February 8, 1979, the court of appeals directed petitioner to purge itself of contempt by offering full reinstatement to Barnhart and by refraining from imposing

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[1] Barnhart was originally hired by petitioner on November 19, 1969, four days after the store was opened. Subsequently, she requested and was granted leave to care for an ill son. She returned to work in October 1970. (Pet. App. 24a-25a.)

[2] 195 N.L.R.B. 939 (Pet. App. 73a-95a).

[3] 472 F.2d 1228 (Pet. App. 72a).

undue or burdensome conditions or tasks upon her.[4] (Pet. App. 9a-10a n.3, 24a-26a.)

Barnhart returned to work at petitioner's store on February 27, 1979. Although the men's wear clerk position she held prior to her unlawful discharge still existed, she was not reinstated to that job (Pet. App. 29a). Instead, Barnhart was rotated between the lamp department and the front registers during her first two weeks back on the job (Pet. App. 30a; A. 230).[5]

On March 12, 1979, after Barnhart had worked in the lamp department and at the front cash registers for about two weeks, Assistant Manager James Dill asked Barnhart to work for a week in the housewares department to put the place in order (Pet. App. 30a; A. 231, 232, 1029). As Dill later explained, Barnhart "was kind of a free girl [who] didn't have any particular place to go * * *" (Pet. App. 34a; A. 1029). When Barnhart began to work in the housewares department, it was highly disorganized. Merchandise and boxes were on the floor and the stock on the shelves was in disarray. Barnhart straightened the shelves, stocking items which were on the floor and putting merchandise where it belonged. (Pet. App. 30a, 35a; A. 232-234.)

On Thursday, March 15, Barnhart arrived at work and found another nonsupervisory employee, Paula Powers, checking in a new order in the housewares department. Barnhart offered to assist Powers, but her offer was refused (Pet. App. 30a; A. 234). Shortly thereafter, Powers instructed Barnhart to stock the new merchandise she had checked in. Barnhart declined Powers' directive and spoke with Assistant Manager Robert Hathorn about nonsupervisory employees giving her orders. (Pet. App. 30a; A. 234-236, 883-884.)

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[4] 592 F.2d 326.

[5] "A." references are to the appendix in the court of appeals.

Hathorn evaded the issue because he viewed Barnhart as a "special situation" (Pet. App. 30a), who had returned to work under a court order (A. 894-895). Five minutes later, Barnhart went back to work, cleaning and reorganizing the housewares department (Pet. App. 30a-31a; A. 236). On Saturday, March 17, Dill told Barnhart she had been doing a "marvelous" job in the housewares department, and offered her a housewares position on a regular basis (Pet. App. 31a; A 237-238). Barnhart accepted the offer, stating that she found the work in the housewares department a "challenge" (Pet. App. 31a; A. 237-238, 391).

The next day, Saturday, March 17, Barnhart again worked in the housewares department and at the front cash registers. On Sunday, Barnhart worked in place of a sick employee at the front registers (Pet. App. 31a; A. 240-241). On Monday, March 19, a lamp department clerk, Francis Kee, told Barnhart that she was to return to the lamp department. Barnhart questioned Kee's order, observing that it was odd for a fellow employee to have more authority than Assistant Manager Dill who had told Barnhart on Saturday that she would work regularly in housewares. Kee replied that she was conveying an order from Store Manager Robert Ricer. Barnhart went to the lamp department and began to perform a set of chores listed for her by Kee, including cleaning and dusting tables, lamps, shelves, mirrors, and picture frames. When she finished with the listed assignments, she contacted Assistant Manager John Caravati, and asked whether she should return to the housewares department. Caravati instead told Barnhart that he would show her how to put the lamp stockroom in order (Pet. App. 32a-33a; A. 241-243, 899-900).

While Barnhart and Caravati were standing on the sales floor talking, Ricer approached them. Ricer reproached Barnhart for taking lengthy breaks, speaking to her in angry tones, audible to anyone within earshot

(Pet. App. 33a, 35a). Ricer's usual practice was to take employees aside to reprimand them concerning minor infractions (Pet. App. 36a; A. 243-245, 412-413, 806, 863-864). Ricer reprimanded Barnhart for taking 14 to 20 minute breaks when she was entitled to only 10 minute breaks (Pet. App. 33a, 35a; A. 243, 408, 801, 901). Although the time card allegedly showing a 20 minute break was ambiguous (Pet. App. 36a; A. 1562), Ricer did not permit Barnhart an opportunity to explain. Ricer concluded his reprimand by ordering Barnhart to stay in the lamp department, and not to leave it for any reason. (Pet. App. 33a; A. 243-244 410-411.) As Barnhart attempted a reply, Ricer told her to take the chewing gum out of her mouth (Pet. App. 33a; A. 243). Testimony showed that other employees took long breaks or chewed gum and were not disciplined (Pet. App. 35a-36a; A. 132-134, 244). Upset by her treatment, Barnhart clocked out and left the store (Pet. App. 33a; A. 244).

2. The ALJ found, *inter alia*, that petitioner violated Section 8(a)(1), (3) and (4) of the Act, 29 U.S.C. 158(a)(1), (3) and (4), by constructively discharging Barnhart on March 19, 1979. The Board affirmed (Pet. App. 9a).

The ALJ found that Barnhart was subjected to disparate treatment by being moved from place to place and treated as "a utility girl assisting other employees" (Pet. App. 34a-35a) and by being subjected to discipline not meted out to other employees (Pet. App. 35a-36a). He concluded that (Pet. App. 37a):

> By reason of its [anti-union] animus, [petitioner] was making icily clear that there was no way that employee Barnhart could expect to be restored to equal treatment with her peers among the employees. [Petitioner] was treating Barnhart in a manner designed to cause her to quit.

3. The Board also found that petitioner owed Barnhart backpay of $34,121.47 plus interest, for the period April 1, 1971, to February 27, 1979 (Pet. App. 12a).[6] In so holding, the Board rejected petitioner's contention (Pet. App. 44a) that Barnhart failed to make reasonable efforts to find interim employment.

The ALJ noted that Barnhart had registered weekly with the Ohio Bureau of Employment Services until her benefits ran out and then registered monthly (Pet. App. 46a). He also noted (Pet. App. 49a) that in the almost 8-year period involved, Barnhart "made about 500 tries at obtaining employment" (Pet. App. 55a) and contacted "more than 150 different employers" (Pet. App. 49a). The ALJ rejected petitioner's contention (Pet. App. 51a) that Barnhart's efforts were not reasonable because "she did not make use of newspaper help wanted advertisements, or hire a private employment agency * * *." He noted that Barnhart had been unaware of the fact that employment agencies might charge a fee to prospective employers and not to the applicant (Pet. App. 50a). He further noted that Board precedent does not require use of newspaper ads and pointed out that, although some of the employers whom Barnhart had contacted personally had placed newspaper ads, none offered jobs to Barnhart. Barnhart had, moreover, used newspaper ads on at least one occasion, unsuccessfully (Pet. App. 52a-54a).

4. In one significant respect, the Board modified the ALJ's recommended Order. Citing its rule that "repeat offenders and egregious violators of the Act" are subject to "broad injunctive relief" (Pet. App. 9a n.3, quoting *NLRB* v. *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357, 1357 (1979)), and finding that petitioner's repeated delays in compliance with Board and court orders

[6] Because petitioner constructively discharged Barnhart in 1979, her backpay continues to run until she is properly and fully reinstated (Pet. App. 11a, 36a-37a).

"clearly demonstrates [petitioner's] disregard for the rights of its employees and its contempt for the National Labor Relations Act and the decisions and orders of the National Labor Relations Board and the U.S. Court of Appeals for the Sixth Circuit" (Pet. App. 9a n.3), the Board, acting sua sponte, modified the ALJ's recommended Order to include broad injunctive language (*id.* at 12a-13a).

5. The court of appeals, in a per curiam opinion, upheld the Board's decision and enforced its order (Pet. App. 7a). The court found that "the administrative record offers ample support for the findings of fact and credibility determinations which underlie the conclusion that [petitioner] 'constructively discharged' Barnhart in March 1979" (Pet. App. 5a).

ARGUMENT

Petitioner challenges the decision below on three grounds: (1) that Barnhart was not constructively discharged; (2) that Barnhart did not undertake "reasonable efforts" to obtain interim employment and thus is not entitled to the full backpay award; and (3) that certain evidence was erroneously excluded from the hearing record. These issues are entirely fact-bound or lie within the discretion of the Board, subject to review by the court of appeals. Further review by this Court is unwarranted.

1. In contending that Barnhart was not constructively discharged, petitioner essentially questions the Board's factual finding, upheld by the court of appeals, that Barnhart was improperly denied a permanent assignment and that the de facto "utility girl" position to which she was consigned was not equivalent to her former position (Pet. 10-19). "The crux of the issue," as the court of appeals observed (Pet. App. 4a), is "the proper interpretation of the testimony introduced at

the administrative hearing."[7] The record reveals conflicting testimony concerning many of the events at issue. The ALJ, judging credibility and evaluating the weight of evidence, adopted one interpretation of the evidence. His findings and conclusions have been reviewed and affirmed by the Board and the court of appeals. Petitioner advocates a different interpretation of the evidence (see Pet. 14-19). There is no need for further review of these purely factual questions by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Petitioner's claims that the ALJ was motivated by "bias" or "prejudice" (Pet. 15, 17 n.6),[8] that the Board "refused to objectively consider the substantial evidence presented by [petitioner]" (*id.* at 19), and that the court of appeals "ignored the significant evidence" (*id.* at 9, 20) are without merit.[9]

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[7] Petitioner's argument relies in large part on challenges to the credibility findings of the Board (Pet. 15, 15-16, 22). However, it is "the Board's function and not [the court's] to resolve questions of fact and credibility when there is conflict in the testimony." *NLRB* v. *Rawac Plating Co.*, 422 F.2d 1259, 1260 (6th Cir. 1970); see also *NLRB* v. *Cement Transport, Inc.*, 490 F.2d 1024, 1029 n.5 (6th Cir.), cert. denied, 419 U.S. 828 (1974).

[8] Petitioner's allegations of bias are based on nothing more than the "feeling that the trier of fact, be he baseball umpire, trial judge or hearing officer, is biased." *NLRB* v. *Lewisburg Chair & Furniture Co.*, 230 F.2d 155, 156 (3d Cir. 1956); see *NLRB* v. *Pittsburgh S.S. Co.*, 337 U.S. 656 (1949). The allegations of bias were specifically considered and rejected by the Board (Pet. App. 9a n.2).

[9] To the extent that petitioner contends that the requirement to consider the record as a whole means that the Board must expressly cite all the evidence supporting its conclusions or rebut every contention raised by the charged party, the substantial evidence rule imposes no such requirement. See *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108, 1112-1113 (1st Cir. 1975); *Trumbull Asphalt Co. of Delaware* v. *NLRB*, 314 F.2d 382, 383 (7th Cir.), cert. denied, 374 U.S.. 808 (1963), citing *United States* v *Pierce Auto Freight Lines*, 327 U.S. 515, 529 (1946).

In any event, the Board's finding is amply supported by the record. Barnhart, who had held a permanent position as clerk in the men's wear department before her improper discharge, was, upon "reinstatement," shifted from department to department, despite being promised a permanent position in housewares, was given instructions by non-supervisory employees, and was singled out for public reprimand. As the ALJ found, petitioner's treatment of Barnhart was an effort to "let[] [her] know that she was just a utility girl assisting other employees" (Pet. App. 35a)—not a co-equal clerk with a permanent responsibility.[10]

2. The General Counsel's burden in a backpay proceeding under the Act is limited to showing the gross backpay an employee would have earned if the employer had not violated the Act. An employer can reduce its backpay liability by establishing, as an affirmative defense, that the employee incurred a willful loss of earnings by failing to search for alternative employment. *NLRB* v. *Reynolds*, 399 F.2d 668, 669-670 (6th Cir. 1968). However, an employer cannot prove a failure to mitigate merely by showing that the employee might have achieved higher interim earnings. The employee is required only to make reasonable efforts to mitigate loss of income. So long as such efforts are reasonable, the employee is not held to "the highest standard of diligence." *NLRB* v. *Arduini Manufacturing Corp.*, 394 F.2d 420, 423 (1st Cir. 1968). Petitioner does not dispute these settled principles. Rather, it contends (Pet. 22-26) that Barnhart did not make a reasonably diligent search for interim employment during the backpay period. This issue also turns on the facts of this particular

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[10] *Portable Electric Tools, Inc.* v. *NLRB*, 309 F.2d 423 (7th Cir. 1962), relied on by petitioner (Pet. 21), is simply an application of the same legal standards employed by the court below to a different record.

case and raises no issue warranting review by this Court.

In any event, the record amply supports the Board's finding that Barnhart's efforts to seek employment were reasonable. The record establishes that Barnhart, who was 43 when she was discharged in 1971, a woman of limited education and little job experience, skill, or training, made about 500 attempts at obtaining employment during the backpay period (Pet. App. 55a), an average of more than one attempt per week (*ibid.*).[11] She also sought employment through the Ohio Bureau of Employment Services (Pet. App. 46a). Petitioner pointed to no specific job opening that Barnhart could have obtained through a more diligent search of employment. Rather, petitioner's argument that Barnhart could have made more successful efforts is, as the ALJ concluded (Pet. App. 51a), merely "speculation and assumption that does not carry [petitioner's] burden of proof to show willful failure of the claimant to mitigate damages."

3. Petitioner's final contention (Pet. 27-30) that it was denied due process by virtue of the ALJ's refusal to admit evidence or issue subpoenas regarding Barn-

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[11] In *NLRB* v. *Flite Chief, Inc.*, 246 N.L.R.B. 407, 410-411 (1979), enforced in pertinent part, 640 F.2d 989 (9th Cir. 1981), relied on by petitioner (Pet. 24-25), the employee made attempts at employment only once a month and lied about a job which she did obtain. The ALJ found that the infrequency of her attempts to obtain work, "coupled with [her] lack of candor in testifying about the single interim job that she did secure" showed a lack of an honest attempt to secure interim employment. In *NLRB* v. *Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014, 1018 (9th Cir. 1979) (Pet. 25), the employee looked for work an average of three times a month over a nine month period while spending a considerable amount of time promoting an employees' association. Barnhart's sustained efforts to find work over an eight-year period plainly exhibit greater diligence than was shown by the employees in the above-cited cases.

hart's withdrawal and subsequent refiling of her unfair labor practice charge is without merit.

It is well established that the ALJ may, in his discretion, refuse to admit evidence, permit testimony, or issue subpoenas where he deems the evidence in question to be cumulative or irrelevant. *NLRB* v. *Tonkawa Refining Co.*, 452 F.2d 900, 903 (10th Cir. 1971). In this case petitioner had full opportunity to cross-examine Barnhart to expose any doubts or uncertainties she may have had concerning her case. The ALJ was within his discretion to exclude additional irrelevant questioning about her filing and withdrawal of an earlier charge. The withdrawal of an unfair labor practice charge does not warrant an adverse inference against the charging party; a charge may be withdrawn pending private settlement efforts or further investigation, or for many other reasons. The ALJ similarly acted within his discretion in denying petitioner's motion to subpoena and question the Regional Director regarding his investigation of Barnhart's case and his motives for dealing with it as he did. Most, if not all, of the information sought is protected by the attorney work product privilege. *J.H. Rutter Rex Mfg. Co.* v. *NLRB*, 473 F.2d 223, 233-234 (5th Cir.), cert. denied, 414 U.S. 822 (1973). Petitioner has shown no reason to believe that it was prejudiced by exclusion of any nonprivileged material. See *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981-982 (9th Cir.), cert. denied, 389 U.S. 913 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

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